Supreme Court, U. S.
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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1978

**No. 78-1472**

DOUGLAS M. COSTLE, Administrator of the United States Environmental Protection Agency,
*Petitioner,*

v.

PACIFIC LEGAL FOUNDATION; JOHN B. KILROY, SR.; THE CITY OF TORRANCE; and THE CITY OF LOS ANGELES,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF IN OPPOSITION FOR RESPONDENTS PACIFIC LEGAL FOUNDATION AND JOHN B. KILROY, SR.

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## BRIEF IN OPPOSITION FOR RESPONDENTS PACIFIC LEGAL FOUNDATION AND JOHN B. KILROY, SR.

### STATEMENT

Respondents Pacific Legal Foundation (hereinafter PLF) and John B. Kilroy, Sr., accept the statement of facts set forth in the petition with the exception of the following necessary corrections and additions.

As set forth in the following argument, PLF and Kilroy disagree with the characterization of both the meaning and the impact of the decision below as expressed by the

Environmental Protection Agency (hereinafter EPA) in section 4 of the statement of facts at 10-11. In addition, there is no merit to the suggestion on pages 8-10 of the petition that issues of law developed by EPA in separate proceedings initiated by EPA and the response by Kilroy thereto establish the lack of factual disputes to be considered in the adjudicatory hearing requested by Kilroy. Kilroy's participation in such agency initiated collateral proceeding was solely to ensure the exhaustion of administrative remedies.

Several material facts have been omitted relating to the action taken by EPA and the failure to provide PLF and Kilroy with an adjudicatory hearing or any other opportunity to participate:

1. The permit issued August 18, 1975, expired by its terms on February 1, 1977.

2. On November 18, 1976, EPA issued a negative declaration which made public EPA's description of the interim sludge disposal project required by the permit. (The permit contained compliance deadlines but no project description.) A public controversy ensued. Appendix A at A-5.[1]

3. On December 15, 1976, EPA announced its intention to issue a *new* permit.

4. During the comment period on the new permit issuance PLF submitted a letter objecting to certain permit requirements and expressly requesting that they not be included in a new permit.

[1]The materials reproduced in Appendices A and B are part of the supplemented record before the court of appeals.



5. On January 24, 1977, EPA announced that the expiration date of the *old* permit was extended to June 30, 1977, to give additional review time to consider the tentative waste discharge requirements prior to the expiration of the permit. Administrative Record, Exhibit 7.

6. On February 14, 1977, PLF and Kilroy filed a lawsuit challenging the negative declaration issued on November 18, 1976, and the failure of EPA to consider the adverse environmental impacts which would occur.[2]

7. On April 18, 1977, the EPA Regional Administrator signed a declaration which acknowledged the controversy and agreed to withhold federal funding for the project until an environmental impact statement was prepared. Appendix A.

The effect of the challenged action taken on June 2, 1977, extending the *old* permit was to require *immediate* implementation of the project without regard to the public controversy, to the promised review of discharge requirements, or to the findings of the environmental impact statement.

## REASONS FOR DENYING THE WRIT

### A. The Decision of the Court of Appeals Does Not Conflict with Decisions of this Court

The petition asserts a conflict between the decision of the court of appeals in this case and the decision of this Court in *National Independent Coal Operators' Association v. Kleppe*, 423 U.S. 388 (1976). Petition at 13. The court of appeals acknowledged that some language in the *National*

[2]*Pacific Legal Foundation v. Quarles*, 440 F. Supp. 316 (C.D. Cal. 1977), appeal pending, No. 77-3844 (9th Cir.).

*Coal Operators* decision suggests that a failure to request a hearing would operate as a waiver of a right to a hearing. *Pacific Legal Foundation v. Costle,* 586 F.2d 650, 658-59 n.3 (9th Cir. 1978); Petition at 19a n.3. However, the substantial factual distinctions between the two cases clearly justify the conclusion by the court of appeals that the language of the *National Coal Operators* decision does not determine the question of whether an adjudicatory hearing should have been conducted in this case. The most significant distinctions include:

1. The coal operators had received actual notice from the Secretary of the Interior of the proposed assessment. Neither PLF nor Kilroy received actual notice of the proposed extension of the permit because EPA, even though it knew of the interest and concerns of these parties, used constructive notice in the form of a newspaper advertisement.

2. The regulations of the Secretary of the Interior expressly provided that if a coal operator failed to request a hearing within 15 days he would be "'deemed to have waived . . . his right of formal adjudication and opportunity for hearing.'" *National Coal Operators,* 423 U.S. at 394. EPA regulations contain no similar provision.

3. The coal operators failed to comply with the requirement in the regulations of the Secretary of the Interior that a hearing be requested within 15 days. Kilroy did request an adjudicatory hearing within the 10-day period established by EPA regulation. EPA denied the request.

4. The coal operators did not seek in court to require an adjudicatory hearing. The issue presented was whether



the assessment of civil penalties could be imposed "without making formal 'findings of fact' even though no hearing was requested." *National Coal Operators,* 423 U.S. at 397. PLF and Kilroy brought this action to obtain the right to be heard in an adjudicatory hearing which the agency had refused to conduct after receiving Kilroy's request.

Considering the substantial differences in the regulations governing the provision of hearings and considering the substantial differences between the actions of the complaining parties and the relief they sought, the court of appeals correctly concluded that this case is not controlled by *dictum* in the *National Coal Operators* decision.

It must also be recognized that the decision of the court of appeals did apply the legal principles set forth in *National Coal Operators* and, for this reason, is not in conflict with that decision. In the decision below the court said:

> "It must be shown that the material facts supporting the decision are not subject to dispute." *Pacific Legal Foundation v. Costle,* 586 F.2d at 658-59 (footnote omitted); Petition at 19a.

In *National Coal Operators,* this Court in describing the holding of the court of appeals identified the same principle:

> "[T]he operator does not dispute the proposed order, including the factual basis of the violation." *National Coal Operators,* 423 U.S. at 396.

The differences in result between the two cases followed from the application of the same principle to substantially different factual situations, not from a conflict between the legal principles applied.

**B. The Petition Requests this Court to Review Evidence and Discuss Specific Facts Not Determined by the Court of Appeals**

The question presented as set forth by the petition contains at least three assumptions of factual matters:

1. That there was due notice of the proposed action;

2. That no one requested a hearing before the proposed action was taken; and

3. That the subsequent request for hearing did not raise material issues of fact.

These factual premises are inconsistent with the facts of the case.

The question of due notice was in substantial dispute before the court of appeals. Kilroy did not see the notice published in the *Los Angeles Times* and despite a standing dispute with EPA over the content of the permit, including an exchange of letters and active litigation in progress, neither PLF nor Kilroy received actual notice of the proposed action. At the time the action was taken, PLF and Kilroy, based upon information they had received that a hearing had been completed, were actively attempting to determine the status of the proceeding. EPA would not release the requested information in response to several telephone contacts. It was necessary to file a Freedom of Information Act request for this information. *See* Appendix B. Only on the day the Freedom of Information Act request was received did EPA call PLF on the telephone with the information that the action had been taken. Under these circumstances the conclusion by the court of appeals that PLF and Kilroy could not be found to have waived an



adjudicatory hearing is consistent with the decisions of this Court which have recognized that under similar circumstances a "mere gesture" for providing notice by "an advertisement in small type inserted in the back pages of a newspaper" is insufficient to put interested persons on notice of the obligation to assert the right to a hearing. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 315 (1949).

The Court should also note that the claim by EPA that "[p]ersons who chose not to make such a request [for direct notice] must rely on newspaper notice" (Petition at 15 n.12) is a misrepresentation of the notice requirements in 40 C.F.R. § 125.32(a). The primary requirement for notice is that it "shall be circulated in a manner designed to inform interested and potentially interested persons." The provisions relating to direct notice to those who request it and newspaper publication are only two of several requirements listed as the *minimum* acceptable actions.[3]

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[3] 40 C.F.R. § 125.32(a) provides:

"(a) Public notice of the proposed issuance, denial or modification of every permit or denial shall be circulated in a manner designed to inform interested and potentially interested persons of the discharge and of the proposed determination to issue, deny, or modify a permit for the discharge. Public notice of hearings shall be circulated in a manner designed to inform interested and potentially interested persons of the discharge and of the intention to hold a hearing regarding the issuance of or denial of a permit for the discharge. Procedures for the circulation of public notice shall include at least the following:

"(1) Notice shall be circulated within the geographical area of the proposed discharge; such circulation shall include any one of the following:

"(i) Posting in the post office and public places of the municipality nearest the premises of the applicant in which the effluent source is located;

"(ii) Posting near the entrance to the applicant's premises and in nearby places; or,

The clear implication of the decision by the court of appeals is that under these facts, PLF and Kilroy were clearly "interested persons" and were not accorded "due notice." *See Pacific Legal Foundation v. Costle,* 586 F.2d at 658-59 n.3; Petition at 19a n.3.

On the subject of a request for a hearing, the regulations of EPA do not provide an opportunity to request an adjudicatory hearing until after a "determination with regard to a permit" has been made. 40 C.F.R. § 125.36(b)(1). Kilroy complied with these procedures. EPA's claim that PLF and Kilroy were required to request an adjudicatory hearing prior to the determination "in response to EPA's published notice of its proposed action" (Petition at 14-15) is in direct conflict with EPA's own regulations. It is obvious that had a request for an adjudicatory hearing been submitted before the action was taken, it would have been denied as premature and not authorized by the regulations.[4]

The final factual assertion by EPA that there were no material issues of fact to be considered in an adjudicatory hearing is indicative of the agency's attempt to hide from the issues in this case. EPA was well aware that PLF and

"(iii) Publishing in local newspapers and periodicals, or, if appropriate, in a daily newspaper of general circulation.

"(2) Notice shall be mailed to the applicant, Federal and State fish, shellfish and wildlife resource agencies, and other appropriate government agencies, and to any person or group upon request and shall provide an opportunity to submit their written views and recommendations on each proposed issuance.

"(3) The Regional Administrator shall add the name of any person or group upon request to mailing list to receive copies of notices within a State or within a certain geographical area."

[4]The confusion as to when an adjudicatory hearing must be requested stems primarily from the fact that EPA's regulations do not provide an opportunity for an adjudicatory hearing prior to the determination of the action as is required by Section 402(a)(1) of the Federal Water Pollution Control Act, 33 U.S.C. § 1342(a)(1).



Kilroy had substantial concerns about the environmental impact of the actions required in the permit. EPA had stipulated that it would address the factual issues of these impacts. Petition at 7-8 n.8. Appendix B. It was based upon this stipulation that Kilroy requested that the environmental impacts be considered in an adjudicatory hearing before the permit was modified.[5] Likewise, the claim by Kilroy that the "record developed" was inadequate obviously related to the lack of consideration of the factual issues. One does not request an "adequate record" for the consideration of issues of law. Moreover, in the court of appeals, EPA readily admitted that the hearing request raised factual issues:

> "[H]is request raised only procedural legal issues and issues concerning the land-based sludge disposal method used to implement the sludge phase-out conditions of the permit." Brief for Respondents at 38.

These "issues concerning the land-based sludge disposal method" are the exact factual issues which the court of appeals identified as being in dispute and requiring an adjudicatory hearing. *Pacific Legal Foundation v. Costle,* 586 F.2d at 659; Petition at 20a-21a.

Petitioner has fashioned the question presented so as to require this Court to review evidence and discuss at least three significant factual issues which were in dispute before the court below. Moreover, since these issues were not determined as set forth in the petition, it is a request that this Court rule on a hypothetical case.

[5]Kilroy's request for an adjudicatory hearing is reproduced in Appendix B to the Petition at 25a-26a.

### C. The Decision of the Court of Appeals Does Not Present a Serious Hindrance to Effective Administration of the Federal Water Pollution Control Act

The apparent motivation for the petition seeking review in this Court is the conclusion expressed at 15-17 that the administration of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251, *et seq.*, will "become hopelessly bogged down" because the decision of the court of appeals requires EPA to routinely hold numerous unnecessary adjudicatory hearings. The decision below will create no such result.

The court of appeals expressly and with great care limited its decision to the facts of this case:

> "Yet, *on this record* we can conclude unequivocally neither that the parties have no dispute about these matters nor that they do. *Under these circumstances* we are unable to deny an adjudicatory hearing on the ground that none of the material facts upon which the EPA's decision rests are disputed. Although ordinarily we might conclude that a silent record reflects no disagreement as to material facts, *the special circumstances of this case* cautions us against that course here. We acknowledge that, should a showing on remand be made in a proper manner that no dispute as to material facts exists, *it would be necessary for us to reconsider our holding* that no 'opportunity for a hearing' was provided." *Pacific Legal Foundation v. Costle,* 586 F.2d at 659 (emphasis added); Petition at 21a.

The effect of the decision of the court of appeals is to require that EPA support a refusal to provide an adjudicatory hearing with a record which demonstrates "that the material facts supporting the decision are not subject to



dispute." *Pacific Legal Foundation v. Costle,* 586 F.2d at 658-59; Petition at 19a. Petitioners without any substantiation imply that this ruling significantly modifies present requirements for an opportunity for a hearing. Petition at 12-13 and 16-17. However, EPA's own regulations already require that a hearing must be held under similar circumstances even though no request has been received. These regulations establish a lesser threshold finding to require a hearing than that established by the court of appeals. Title 40, Code of Federal Regulations, § 105.7(c) provides:

> "(c) *Opportunity for Hearings.* Where the opportunity for public hearing is called for in the Act, and in other appropriate instances, a public hearing should be held if the hearing official finds significant public interest (including the filing of requests or petitions for such hearing) or pertinent information to be gained. Instances of doubt should be resolved in favor of holding the hearing, or if necessary, of providing alternative opportunity for public participation."[6]

This regulation expressly refutes the contention in the petition that hearings must be granted only on receipt of a request. The minimal threshold test established by the regulations for determining whether a hearing should be held without a request—whether there is "pertinent information to be gained"—is clearly less rigorous than that employed by the court of appeals. Therefore it is impossible to believe EPA's unsubstantiated assertion that there is a significant number of cases in which the decision of the

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[6] *See also* 40 C.F.R. § 125.34(a):
"[W]here the Regional Administrator finds a significant degree of public interest in a proposed permit or group of permits, he shall hold a public hearing to consider such permit . . . ."

court of appeals would require a hearing which is not already required by regulation.

The claimed burden on EPA is particularly unlikely since the conclusion of the court below follows from the application of the adjudication requirements of the Administrative Procedure Act, 5 U.S.C. §§ 554, 556, and 557.[7] *Pacific Legal Foundation v. Costle,* 586 F.2d at 658; Petition at 17a.

Under the Administrative Procedure Act provisions quoted by the court of appeals in its decision, an adjudicatory hearing is required only when there is a controversy *and* the parties are unable to resolve that controversy short of hearing. 5 U.S.C. § 554(c). Therefore, considering the " 'relatively small percentage of cases' " (Petition at 16) which apparently involve significant dispute, there will be little, if any, increased burden on EPA. This conclusion is reinforced by the fact that an adjudicatory hearing is already available in cases in which there are disputed facts under present EPA regulations. 40 C.F.R. § 125.36.

To bolster the questionable claim of great administrative burden EPA suggests that "all a complainant need do in order to set aside the Agency's action, under the court's decision, is to suggest plausibly in the court of appeals that some members of the public might disagree concerning factual matters implicated by the Agency's action." Petition at 16. The decision says no such thing. The court of appeals clearly indicated that review of an EPA decision not to conduct an adjudicatory hearing would be conducted as

[7]Petitioner has not taken exception to the holding by the court of appeals that Section 402(b)(1) of the Federal Water Pollution Control Act requires the application of the adjudication provision of the Administrative Procedure Act.



with other administrative action by determining whether the record supported that determination. The court stated that it would look to see "whether a showing has been made demonstrating that a hearing is unnecessary" (*Id.* at 658; Petition at 18a) and that on a proper record "it would be necessary for us to reconsider our holding" (*Id.* at 659; Petition at 21a). The record presented in this case, however, was "barren of any explanation." *Id.* at 660; Petition at 22a. The court also noted that it would not order a hearing where it "would be futile" (*Id.* at 659; Petition at 20a) or "would be useless" (*Id.* at 660; Petition at 22a). There is no basis in the decision for a conclusion that a mere suggestion to the court of appeals of a plausible factual issue would result in the remand of an otherwise proper decision not to conduct an adjudicatory hearing.

Petitioner also misreads the decision of the court of appeals as acknowledging the existence of the burden of which EPA complains. Petition at 16. The cited portion of the decision, however, is not discussing administrative burdens from conducting hearings but the " 'heavy burden of justification' " resting on the agency when refusing to allow a hearing. *Id.* at 658-59; Petition at 18a-20a. EPA made no factual showing to the court of appeals that a significant administrative burden would result from providing hearings under the facts of this case. The petition likewise fails to make any such showing. Instead, EPA relies on the unsubstantiated assumption that interested persons who desire adjudicatory hearings which are readily available to them on request under EPA regulations will instead flock to the court of appeals to obtain orders for such hearings.

Such unfounded speculation is hardly a worthy basis to invoke the review of this Court.

## CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari does not raise a substantial issue worthy of consideration by this Court and should be denied.

Respectfully submitted,

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April, 1979

**(Appendices Follow)**

# Appendices

## APPENDIX A

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| PACIFIC LEGAL FOUNDATION, et al., Plaintiff, v. JOHN R. QUARLES, JR., et al., Defendants. | Civil No. 77-0521 HP Affidavit of Paul De Falco, Jr. |

State of California
County of San Francisco } ss

Paul De Falco, Jr. being duly sworn, deposes and says:

1. I am the Regional Administrator, Region IX, United States Environmental Protection Agency (EPA), San Francisco, California. In my capacity as Regional Administrator, I am the chief executive officer for EPA in Region IX and am responsible for administration of EPA's programs in Arizona, California, Hawaii, Nevada, Guam, American Samoa, and the Trust Territories.

2. Under Title II of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 33 U.S.C. §1281 *et seq.*, the Administrator of EPA is authorized to award grants to municipalities for construction of wastewater treatment facilities. The authority of the Administrator of EPA to award grants under Title II of FWPCA has been delegated by the Administrator to the Regional Administrators of EPA.

3. Under an agreement signed May 23, 1975, general administration of the construction grant program of Title II of FWPCA was delegated to the California State Water Resources Control Board (SWRCB). The agreement, however, did not delegate to the SWRCB the actual authority to award Federal construction grants. The final decision making authority for award of Federal construction grants in California is thus my responsibility as Regional Administrator.



4. On August 22, 1975, the City of Los Angeles submitted an application for a grant under Title II of FWPCA, for construction of an interim sludge processing and disposal system for the Hyperion treatment plant. The City had previously submitted a Project Report to EPA in 1975 which discussed the feasibility of the Interim Sludge Project.

5. The proposed Interim Sludge Disposal Project is designed to eliminate the discharge of sewage sludge to the ocean from the Hyperion plant until an ultimate solution for the disposal of sludge is developed. The City of Los Angeles is presently a participant in a cooperative effort with Los Angeles County and Orange County to develop a facilities plan and joint Environmental Impact Report/ Environmental Impact Statement (EIR/EIS) regarding alternatives for the ultimate disposal of sewage sludge. This effort is partially funded by a grant from EPA under Title II of FWPCA.

6. In accordance with EPA's Guidelines for Compliance with NEPA in the Title II Wastewater Treatment Works Construction Grants Program (40 C.F.R. §6.512), EPA prepared an Environmental Impact Appraisal for the Interim Sludge Disposal Project which was issued on November 18, 1976. (Attachment Q, Memorandum in Support of Motion To Dismiss). The Environmental Impact Appraisal contained a discussion of the anticipated impact of the project on the environment, a discussion of mitigation measures to be taken, and a discussion of alternatives to the proposed project.

7. On the basis of the Environmental Impact Appraisal and the EIR prepared by the City of Los Angeles, EPA issued a Negative Declaration on November 18, 1976, regarding the environmental impact of the Hyperion interim sludge project. (Attachment P, Memorandum in Support of Motion to Dismiss). The Negative Declaration stated that it was EPA's conclusion that the proposed project would not have significant environmental impacts and that EPA had made a preliminary decision not to prepare an Environmental Impact Statement.

8. The City of Los Angeles is presently developing a facilities plan covering all aspects of future wastewater treatment, which is referred to as the City of Los Angeles Wastewater Facilities Plan. This plan will include a detailed discussion of alternative means of achieving effluent limitations based upon secondary treatment at the City's existing treatment facilities and a discussion of the Interim Sludge Disposal Project. The City and EPA are also developing a joint EIR/EIS covering the environmental impact of the City of Los Angeles Wastewater Facilities Plan. Preparation of the plan and the joint EIR/EIS is partially funded by a grant from EPA under Title II of FWCPA.

9. The EIR/EIS for the City of Los Angeles Wastewater Facilities Plan will include a detailed analysis of the potential environmental impact of the Interim Sludge Disposal Project. This analysis will include a discussion of alternatives to the Interim Sludge Disposal Project and a discussion of the environmental impacts of the present disposal of sludge to the ocean.



10. In view of the controversy regarding the Hyperion Interim Sludge Project which arose subsequent to the issuance of the Negative Declaration and Environmental Impact Appraisal, I have decided that EPA should not award a grant to the City of Los Angeles for construction of the project until the public has had a further opportunity to comment on the environmental impact of the project. I have, therefore, directed that no action should be taken on the grant application submitted by the City of Los Angeles for the Hyperion Interim Sludge Project until the requirements of the National Environmental Policy Act have been satisfied with respect to the EIR/EIS for the City of Los Angeles Wastewater Facilities Plan.

PAUL DE FALCO, JR.
Paul De Falco, Jr.

Subscribed and sworn to before me this
18th day of April, 1977.

(SEAL)

MELINDA TAPLIN
Notary Public

My commission expires July 6, 1980.

## APPENDIX B

(Letterhead of Pacific Legal Foundation,
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Sacramento, California 95814,
Telephone (916) 444-0154)

June 10, 1977

Mr. William H. Pierce, Chief
Permits Branch Enforcement Division
United States Environmental
Protection Agency
100 California Street
San Francisco, CA 94111

Dear Mr. Pierce:

In re: Hyperion Treatment Plant, Los Angeles, California, Interim Sludge Processing and Disposal System Extension of Expiration Date for NPDES Permit No. CA0109991, Reference: E-4-1 869.2D

This is a request pursuant to the Freedom of Information Act, as amended, 5 U.S.C. § 552.

We have attempted through telephone conversations with Environmental Protection Agency Region IX offices to find out whether the extension has been approved and, if so, on what date. Thus far, we have not been given a response.

In accord with the provisions of the Freedom of Information Act, please furnish us with the following:

1. The date of issuance of the Environmental Protection Agency extension of the expiration date to December 17, 1979, of NPDES Permit No. CA0109991.

2. The official document of the Environmental Protection Agency which establishes the extended expiration date of the permit.

3. All supporting documents and materials which form the basis for the decision to extend the expiration date of NPDES Permit No. CA0109991 from June 30, 1977, to December 17, 1979.

Pacific Legal Foundation is a nonprofit, tax-exempt law firm serving the public interest. We therefore request that in accordance with the provisions of the Freedom of Information Act any fees be waived, as the information is requested primarily to benefit the public.

Very truly yours,

DAVID M. SHELL
Law Clerk